

1917

The Real Estate Broker's Right to Compensation Where His Employer Misrepresented the Property

William L. Ransom

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

William L. Ransom, *The Real Estate Broker's Right to Compensation Where His Employer Misrepresented the Property*, 3 Fordham L. Rev. 57 (1917).

Available at: <https://ir.lawnet.fordham.edu/flr/vol3/iss3/1>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

FORDHAM LAW REVIEW

VOL. III

MARCH, 1917

No. 3

THE REAL ESTATE BROKER'S RIGHT TO COMPENSATION WHERE HIS EMPLOYER MISREPRESENTED THE PROPERTY

By WILLIAM L. RANSOM

Justice of the City Court of the City of New York.

This article deals with a phase of the troublesome question as to the right of a real estate broker to recover commissions upon transactions which fail of consummation through his employer's act or fault. The issue here discussed is, more particularly, whether a broker who has brought his principal and a prospective purchaser to agreement upon all essential terms of the contemplated contract of sale on the one hand and purchase on the other, is nevertheless barred from recovery, in the Courts of this State, by the development (1) that the owner, in stating to the broker the terms on which he would be willing to sell the property and on which the broker was to find a purchaser, also greatly misstated some material fact affecting the attractiveness of the property as a business venture—for example, the rentals currently received therefrom; (2) that the prospective purchaser, produced as a result of the labors of the broker, had, in indicating his readiness to buy upon the indicated terms, based his acceptance on the rental figures fraudulently or mistakenly given the broker by the owner; (3) that in consequence the purchaser procured by the broker refused to sign a contract which would compel him to pay the agreed price for property yielding less than the represented rentals; and (4) that in consequence no contract was signed, no transaction consummated, and the broker's efforts went for naught.

Doubtless it will be surprising to the reader of this article, as it was to me, to find that this question, so likely to arise with frequency in the multitudinous realty transactions of a great metropolis, has not been clearly or authoritatively determined in the Courts of New York State. There is every reason why it might

be expected that such a question would long ago have been decided beyond a doubt in this jurisdiction. Of the ninety-three billion dollars of assessed valuation of real property in the United States, eight billion dollars represents property in New York City and thirteen billions represents property in New York State—nine per cent. of the total realty value in the United States is located in New York City, fourteen per cent. in New York State. More than half of New York City's nine per cent. is situated on a single island which once was sold for twenty-four dollars. On the basis either of their number or of the value of the property involved, a very large percentage of the total real estate transactions, by way of sale or rental, in the whole United States in any year, take place within the limited area of New York City and the New York State counties immediately contiguous thereto. By reason of a number of conditions which need not be dwelt upon in detail, the question indicated at the opening of this article is likely to arise with greater frequency in the metropolitan real estate market than anywhere else in the United States, and there is no community in which it is of greater importance that the law of the subject should be authoritatively decided and clearly expressed. Nevertheless, in spite of all these circumstances, more than a doubt remains as to the New York rule, and although I think I have a clear concept of the trend of decision and of the eventual ruling which will probably be made, it cannot be said that an attorney may yet advise his client with certainty and confidence that the ultimate holding will grant or deny to the broker a right of action against the mis-representing owner. The importance of the question in this metropolitan community and the confusion which has arisen concerning it, seem to warrant an effort, even at length, to analyze the authorities and reach a conclusion as to the better supported rule.

At the outset, it may be of aid to point out that the confusion and doubt in the New York law of the subject seem to arise from the atmosphere of metropolitan real estate transactions, and to be the product of a judicial feeling, sometimes hinted at but more often unexpressed, that conditions of complexity, machination, collusion, deceit and downright dishonesty, so often attend the claims of real estate brokers to commissions upon unconsummated transactions in the metropolitan real estate market, as to call for the most severe judicial scrutiny of all such claims and to require the Courts oftentimes to do substantial justice by reaching conclusions in particular cases which fly in the face of the rules

of law accepted in jurisdictions where real property is less valuable and brokers are less persistent, adroit, and oftentimes unconscionable. With all deference, it may be said that in New York the appellate Courts seem most generally to have refrained from direct and definite discussion of the legal principles involved, and perhaps purposely to have left those principles more or less undefined, in order that the way might be left open for refusal of recovery in particular cases where the outcome in the trial Court worked injustice or gave effectiveness to fraud. At least it appears warranted to say that in instances where brokers have been permitted to recover commissions upon unconsummated transactions, opinions have rarely been written, affirmances have usually been without opinion, and many of the memoranda which uphold the broker's recovery are cryptic and skeletonized, so far as their discussion of the law is concerned. On the other hand, the reports contain numbers of decisions in which the brokers were denied recovery, and in these, too, the Courts confine themselves closely to the particular facts, profess to consider each particular case to be more or less *sui generis*, and proceed solemnly to reach and state a result not at all reconcilable with the pronouncements of the Courts of other commonwealths. It seems oftentimes to have been the actual point of view of the members of appellate Courts in this State that as a matter of a sound, just and workable social rule on the subject, the law should not under any circumstances recognize the right of any real estate broker to commissions upon any transaction where he does not induce his employer and a prospective purchaser either to close the transaction or sign a contract in black and white, thereby leaving no room for doubt that the broker had in fact performed the task which he says he was employed to perform. It seems oftentimes to be the expressed or unexpressed view of New York Courts, that in this metropolitan community, where brokers are so numerous and persistent, languages and business methods so diversified and susceptible of varying interpretations, and property values so enormous, it is unsafe to permit recovery upon unconsummated transactions, in any instance where the basis of recovery hinges wholly upon oral testimony and may rest altogether on collusive action and glib oral assertions, on the part of an unscrupulous broker and a supposititious "prospective purchaser." How far our New York Courts have been influenced by local commercial conditions and how justifiable is any such hypothesis as has been indicated, in general or in particular cases, it is not within the prov-

ince of this article to discuss; but I do not think a full and fair understanding of the history of this legal question in this State can be reached, without taking into account the influence of the point of view to which I have referred.

The starting-point of any discussion of the rights of a real estate broker to commissions is of course that such a broker is an agent authorized and employed to make available to his employer an indicated result. He is not employed to close a transaction, but to enable a transaction. He does not undertake that his employer will wish to close, or be able to close, the transaction for which his employer sent him out to procure an opposite party; he undertakes only that he will make it possible for his employer to close the indicated transaction on the indicated terms, if the employer continues to so desire and is in position to do so. He undertakes to procure an opposite party ready, willing and able to close the transaction with the broker's employer on the terms which the latter gave to the broker; he guarantees against the unwillingness or inability of the opposite party so produced, but not against his own employer's change of mind or developed inability actually to close the transaction on the terms and basis committed to the broker. Upon this foundation of fundamentals, it is of course commonly and correctly said that the brokerage contract is one under which the broker assumes all the risk that his effort will not avail to accomplish the stipulated result. The owner agrees that the broker may endeavor to find a purchaser for the property indicated by the owner upon terms also indicated by the owner; to such a purchaser, the owner agrees to convey the property on the indicated terms, and agrees to pay the broker for making available to the owner the consummation of such a transaction. If the broker does not do this, his best efforts go unrewarded, and it is likewise said with entire accuracy that the broker takes all the risk that failure of consummation will leave him without right to recompense for his work, with the sole exception that where he brought the parties to agreement upon terms, non-consummation through his employer's choice or fault cannot be urged to bar his recovery (*Sibbald v. The Bethlehem Iron Co.*, 83 N. Y. 378). There is accordingly, I take it, no fair doubt in this jurisdiction, under authorities which need not be reviewed, that a broker who has brought to his principal a purchaser who signs an enforceable contract to buy the property on the owner's terms, may recover, in an action upon the brokerage contract, his agreed compensation, even though (1) his principal is unable to close the trans-

action by conveying the property as described in the contract; or (2) his principal refuses to complete the transaction; or (3) it appears that the principal had so mis-represented the property to the broker and purchaser, even as to particulars not set out in the signed contract to purchase, that the purchaser does not consummate the transaction (*Glentworth v. Luther*, 21 Barb. 145; *Condict v. Cowdrey*, 26 J. & S. 365; 5 N. Y. Supp. 187). The broker is regarded as having produced the requisite "meeting of the minds" between vendor and vendee when signatures are attached to a contract to buy on the terms on which he had been employed to find a purchaser, and no change of mind, inability, mis-representation, or other act or fault on the part of the owner, can then change the fact that the broker has performed the task for whose performance the owner agreed to pay.

It has likewise been commonly held that the broker is entitled to his compensation where the owner's authorization asked him to procure an able purchaser for *accurately represented* property upon indicated terms, and the owner refuses to contract or convey when the broker produces a purchaser willing to sign a contract and meet the terms as indicated for the property as represented. There being under such circumstances no difference between the property as described to the broker and the property as actually owned and conveyable, the broker is again regarded as having completed his undertaking under the brokerage contract, in making available to the owner the consummation of such a sale as his employment contemplated, and his employer is not permitted to urge the latter's own choice or fault to defeat his agreement to pay for a stipulated result. The minds of the parties are regarded as having met when the broker, in behalf of his principal, offers the property upon the terms stated by the owner and the potential purchaser accepts those terms without qualification, and the broker and purchaser place before the owner the latter's readiness and ability to buy on the terms communicated to the broker. Recovery under the brokerage contract is accordingly sanctioned.

But what of the broker whose best efforts bring about no signing of a contract, no production of a purchaser willing to fulfill the owner's terms for the property as it actually is—the broker whose principal sends him forth on a task which can never result in enforceable contract; the broker who procures a purchaser willing to sign and carry out a contract, on the owner's terms, for the property as described by the owner to the broker and so in turn to the purchaser, only to find that the property which the owner

could contract to convey differs greatly from the property which the owner had, by the terms of his authorization, sent the broker forth to sell? It will be noted that the issue no longer concerns the owner's refusal or failure to consummate a transaction which could have been closed but for his change of mind, or even his inability to convey property as described in a signed contract to convey. The broker never procured a person willing to buy what the owner in fact had to sell; he only procured a purchaser for the property for which his employer, by the terms and descriptions contained in the broker's authorization, asked him to procure a purchaser. May the broker recover, under the equitable doctrine of the *Sibbald* case, in an action on the contract or for damages, or may the employer urge his own mis-statements, wilful or otherwise, to defeat the compensation of an employee who has done what he was asked to do and has made possible the result which he was asked to make possible, only to find that the result is one which, as between his employer and a third person, cannot be carried out?

What answer do the New York Courts make to these queries? May the plaintiff broker recover his commissions from the inaccurate or fraudulently mis-representing owner? I have already referred to the apparent divergence from the general view, which has commonly characterized the approach of New York City tribunals to this juristic problem. The Supreme Court of the United States has drawn a clear distinction between fulfillment of the brokerage contract and consummation of the contract to buy and sell, and has resolved the present question in favor of the broker (*Dotson v. Milliken*, 209 U. S. 237); the rule in most of the States is in apparent accord (*Hannan v. Moran*, 71 Mich. 261; 38 N. W. 909; *Hugill v. Weekley*, W. Va., ; 61 S. E. 360; 15 L. R. A. (N. S.) 1262; *Lewis v. Mansfield Grain & Elevator Co.*, Texas Civ. App. ; 21 S. W. 585; *Roberts v. Kimmons*, 65 Miss. 332; 3 South. 736; *Conkling v. Krakrauer*, 70 Texas, 735; 11 S. W. 117; *Gillespie v. Dick*, Texas Civ. App. ; 111 S. W. 664; *Middleton v. Thompson*, 163 Pa. 112; 29 Atl. 796; *Sweeney v. Oil & Gas Co.*, 130 Pa. 193; *Keys v. Johnson*, 68 Pa. 42; *contra*, but distinguishable, *Crockett v. Grayson*, 98 Va. 354; 36 S. E. 477). It should, however, be said that in the *Hughill*, *Lewis*, *Roberts*, and *Gillespie* cases, *supra*, the owner and purchaser had entered into written contracts before the owner's mis-representations were discovered; only in the Pennsylvania cases is there a square holding that the failure to

reach the point of a written contract is inconsequential. The New York Court of Appeals has not passed upon the question, but *Curtis v. Mott*, (90 Hun, 439; appeal dismissed, 158 N. Y. 663), *Diamond & Co. v. Hartley*, (38 App. Div. 87; 47 App. Div. 1), *French v. Brush-Swan El. Light Co.*, (39 N. Y. St. Repr. 515), *Hausman v. Hertfelder*, (81 App. Div. 46; appeal withdrawn, 177 N. Y. 567, and *Keough v. Meyer*, (127 App. Div. 273), are relied upon as declaring, in this metropolitan area where the multiplicity of the real estate operations and the magnitude of the property values involved have been deemed to call for the severest judicial scrutiny of claims for commissions upon un consummated transactions, a concept of the brokerage contract adverse to the broker's claim.

The query as to the New York rule came pointedly before me some months ago in an action entitled *Nelson, Lee and Green, Inc. v. Daly* (N. Y. Law Journal, February 3, 1917; 163 N. Y. Supp. ; not yet officially reported). Inasmuch as that case is no longer pending in the Courts, I may use it as illustration, because it embodied the elements of the analysis to be made of the New York cases on the subject. The brokerage contract sued on in the case dealt with the procuring of a tenant for a long-term lease, but no difference in essential principle is involved, as between lease and purchase. The plaintiff was a corporation engaged in the business of real estate brokerage. On June 27, 1916, the defendants, owners of real property at Third Avenue and Thirtieth Street, in the Borough of Manhattan, asked the plaintiff to procure for them a tenant, upon indicated terms of indenture. Admittedly no lease or contract was ever entered into between the defendants and any tenant procured by the plaintiff, but the latter insisted that it made available to the owner exactly and fully the result for which the defendants, by the terms of the brokerage contract, offered and agreed to pay a commission and that the broker could not be refused his commissions merely because the property which the owner sought to lease to the proposed tenant was found to vary materially from the property for which the broker was employed to, and did, procure an acceptable tenant.

The case was before the Court upon the allegations of the complaint and of the opening address of the plaintiff's counsel. For the purposes of this article, those averments will of necessity be deemed true. At the time the plaintiff was employed and as a part of the letter of authorization, the defendants represented

to the plaintiff that, among other things, the rentals at that time being received from the premises were in excess of \$7,000. per year. He then went ahead and found a tenant willing to lease such a property on the indicated terms. All the details of the lease were agreed upon between the tenant and the defendants; the latter's lawyers drew a lease embodying the terms on which the defendants were willing to enter into a 21-year lease with the tenant; this proposed lease was acceptable, in substance and form, to, and accepted by, the tenant procured by the plaintiff, and the lease was sent to the tenant for execution. As a part, however, of what the defendants had told the plaintiff's representative about the property, the latter had in turn informed the prospective tenant that the current receipts in rentals exceeded \$7,000. per year. The plaintiff repeatedly asked the defendants for an itemized statement of the rentals, so that the same might be furnished the tenant, but the defendants delayed compliance, assured the plaintiff that the annual rentals in fact exceeded \$7,600., and said that an itemized statement would be furnished before the tenant was asked actually to execute the agreed form of lease. When the lease went to the tenant for signature, with it went for the first time an itemized statement of the actual receipts from rent. Admittedly this revealed yearly collections of about \$6,200., rather than \$7,000. or \$7,600. The prospective tenant, in the light of this disclosure, did not want such a property at all upon the owner's terms, although he had been ready and willing, and acceptable, for a closing on those terms until he discovered that the rentals were not in the sum represented by the owners to the broker and by the broker to the proposed lessee. The deal thereupon fell through, and the plaintiff's work availed nothing.

Under the circumstances stated, it is obvious that no contract or obligation, between owner and proposed tenant, was at any time brought into being or even rendered possible. The broker did bring the owners and the proposed tenant to agreement upon all the terms of rental, payments, repair covenants, and the like, which were to go in the proposed lease, but there was no meeting of the minds and no mutual readiness to close on those terms, because the owners had offered those terms as to a property which was in fact yielding less than \$6,200. per year and the proposed tenant had accepted those terms only as to a property yielding \$7,600. per year. Not the owners, but the proposed tenant, refused to consummate the transaction by signing a mutually acceptable form of contract; the owners were at all times willing to

lease their property at the rental and on the terms which the tenant had accepted; the broker never produced a tenant actually willing to close for the particular property on the contract terms. Can it be said, in this State, that, as between the broker and his employer, the former fulfilled his contractual undertaking and is entitled to recover, despite the proposed tenant's refusal to consummate a contract with the owner?

Answer to that query involves analysis of the authorities as to several mooted points affecting the brokerage contract. Does the owner's description of the property the broker is employed to sell enter into and become a part of the brokerage contract, so that his undertaking is to find a purchaser for such a property? What is the subject-matter of the contract between owner and broker—the owner's property as it actually is or the property as the owner describes it? Under the brokerage contract, who takes the risk of the owner's misrepresentations as to his property, wilful or otherwise? Does the broker "assume the risk" of that, too? And what constitutes performance of the brokerage contract—making available a sale of such a property as the owner sent the broker out to sell, or nothing short of the signing of an enforceable contract to buy the property actually owned? If less than the latter can ever be effectual performance of the brokerage contract, could it be said that in this State the plaintiff in the *Daly* case had not done that for which a commission was to be paid?

Curtis v. Mott (90 Hun, 432), chiefly relied upon by those who would deny to the broker recovery of commissions, proceeds plainly on the hypothesis that the broker assumes the risk of the owner's misrepresentations and performs his contract only if the third person, willing to accede to the owner's terms for the property as it was represented by the owner, proves willing also to fulfill the same terms for the property as it proves in fact to be. In *Curtis v. Mott*, decided by the General Term for the First Department in 1895, the plaintiff as broker had been employed to sell the defendant's property at a fixed price, at a rate of commission agreed upon. He produced a man who would have bought it at the seller's terms provided the monthly rentals at the time had been equal to those represented to him by the broker. The seller, in response to an inquiry of him by the broker, had stated the monthly rentals to have been \$510., whereas they were in fact \$488. No contract was signed, for the sole reason that the purchaser would not pay the agreed price for a property renting

for so much less than he had been told. Mr. Justice Alton B. Parker, with whom concurred Presiding Justice Van Brunt, ruled that "under the authorities in this State, it was necessary for him, in order to earn his commissions, to produce a purchaser who should be ready and willing to purchase the property upon the would-be seller's terms" and that this the broker had not done. "Whether in a proper action this plaintiff could recover damages," added the prevailing opinion, "because of misrepresentations which prevented performance of his contract, we need not consider, as that question is not before us." Mr. Justice Morgan J. O'Brien dissented, but the majority held that the judgment could not stand, "although it may well be that in this particular instance it works substantial justice." In the Court of Appeals on January 16, 1899, the appeal was dismissed without argument, and the holding of the General Term has been at no time reversed or in terms rejected. In at least one instance it has been cited and followed in the First Department (*Hausman v. Herdtfelder*, 81 App. Div. 46).

The sole authority cited in *Curtis v. Mott* is hardly helpful. It in fact does not relate to the present issue at all. In *French v. Brush-Swan El. Lt. Co.* (39 N. Y. St. Repr. 515; General Term, 1st Dept., 1891), the plaintiff was authorized, by letter, to procure a purchaser for certain electric lighting processes and appliances. He found a purchaser who was willing to buy on condition that the process, after tests, should be found to do as represented. Although the purchaser refused to buy when the process failed to stand the test, the broker sought recovery of his compensation. It was held, with obvious correctness, that the plaintiff had only procured a purchaser willing to buy on conditions subsequently unfulfilled, and that the owners' representations as to what the process would do, contained in a "circular to agents" were not so incorporated in the brokerage contract as to enable the broker to claim performance merely by procuring a purchaser willing to buy in the event the statements of the circular proved true under future tests.

In *Diamond Co. v. Hartley*, the issue was presented to the Appellate Division for the Second Department in 1899 (38 App. Div. 87) and for the First Department in 1900 (47 App. Div. 1). Here also there was no contract signed, though a contract was drawn, in a form mutually acceptable. When the time came for signing, it developed that the owner had stated the property to be four and one-half inches wider than it in fact was, and the proposed con-

tract had been drawn by the owner's counsel with the incorrect width as a part of the description. The abstract showed the true facts; the proposed purchaser refused to accept a modification to conform to the actual width unless an allowance were made him; and the transaction fell through. The decision of the First Department, adverse to the broker's recovery, appears to have been based upon the fact that the owner was not seeking to sell his property and had given information of its width only most casually to the broker's representative who approached him with a request for a statement of the price at which he would be willing to sell. It did not appear that the mis-statement was intentional, much less fraudulent, that the owner had any idea any one would act on it or rely on it, or that the broker's representative understood the information to be a warranty of width. All the indications were regarding as warranting the inference that "what the plaintiff went to buy and what the defendant authorized him to sell was the house No. 17 West Thirtieth Street as it stood, and for that house as it stood these plaintiffs have never procured a purchaser willing to purchase upon the defendant's terms," and the learned Court so held. Under the circumstances, it could hardly be said that the owner's casual statement became an integral part of the brokerage contract.

This carefully limited pronouncement of the First Department is perhaps significant, in view of the fact that the year before, in the same controversy, the Second Department had based a similar outcome upon a more sweeping generalization. That Court, through Mr. Justice Woodward, declared that

"The law of this case seems to be well settled; the plaintiff must be able to establish that it has produced a party able and willing to take the property at the defendant's own terms; and to do this it must show that the parties to the transaction have reached an *enforcible agreement* as between themselves."

The Court quoted with approval, and held applicable, the statement in *Platt v. Kohler* (65 Hun, 557, 559), that

"The plaintiff's right to payment depended upon his procuring a person ready and willing to contract in such a way as to be legally bound to perform. His service was incomplete until that was done. . . . Where . . . the party produced by the broker refuses to conform thereto by entering into a binding obligation, the broker has failed to effect the purpose of his employment."

Under the ruling of the Second Department in this case, it would seem: (1) that the subject-matter of the brokerage contract is the same as that of the ultimately *possible* contract between the owner and purchaser, *viz.*, not the property described by the owner to the broker, but the property which the owner could in fact convey; and (2) that the broker can recover his commissions only by showing that the owner and purchaser entered into a mutually enforceable agreement or that the purchaser was willing to buy, on the indicated terms, the property actually demisable by the owner and that the owner refused to contract to convey that property upon those terms.

Hausman v. Herdtfelder (81 App. Div. 46; appeal withdrawn, 177 N. Y. 567) must be regarded as authority for the proposition that the broker assumes all the risk of the frustration of his efforts by the owner's misrepresentations, and that he becomes entitled to his commissions only by procuring a purchaser willing to take the property as it actually is, regardless whether he procures a purchaser ready to close for such a property as the owner's description authorized him to sell. That case was decided by the First Department in 1903, upon specific citation of *Curtis v. Mott, Diamond Co. v. Hartley*, and *French v. Brush-Swan El. Lt. Co.*, above referred to. The proposed purchaser had refused to sign a contract because it called for a deed of property ten feet less in depth than the aged defendant had stated the property to be, to the broker at the time of the brokerage contract, and to the purchaser. The Court held, through Laughlin, J., that under the facts disclosed, the plaintiff "was employed, not to sell a certain number of feet of land, but the premises as they were occupied and with which he was familiar. . . . Assuming . . . that she did inform him that the lot was 76 feet in depth, that was at most a mere representation and not a warranty."

To similar effect is *Keough v. Mayer* (127 App. Div. 275), decided by the Second Department in 1908, upon the cited authority of the two cases last above discussed. The owner had inaccurately stated the frontage of the property, at the time he employed the broker, and to the proposed purchaser. The Court ruled, through Gaynor, J., that the statement to the broker "did not enter into the contract of employment. It was to get a purchaser for the plot just as it was." And the learned Court strangely added: "If the defendants afterwards told the proposed purchaser during the negotiation that the frontage was 168 feet, that did not change the contract of brokerage."

Is it to be concluded from the foregoing cases that there is in this State no influential authority in support of the Federal rule (*Dotson v. Milliken*, 209 U. S. 237)? On the contrary, there is an impressive line of well-considered cases which find starting-point in the lucid expressions of Judge Finch in *Sibbald v. The Bethlehem Iron Co.* (83 N. Y. 378) and proceed in discreet disregard of the precedents already reviewed. In the *Sibbald* case, decided in 1881, the Court of Appeals said that "the duty of the broker consisted in bringing the minds of the vendor and vendee to an agreement," the production of "a purchaser ready and willing to enter into a contract on the employer's terms," "the meeting of their minds, produced by the agency of the broker. The risk of failure is wholly his . . . This, however, must be taken with one important and necessary limitation. If the efforts of the broker are rendered a failure by some fault of the employer . . . then the broker does not lose his commissions. And that upon the familiar principle that no one can avail himself of the non-performance of a condition precedent, who has himself occasioned its non-performance." Nothing in the *Sibbald* case held or indicated that the broker might recover where there had been no contract or where the purchaser had refused to contract to buy the physical premises actually owned, but the rule of frustration through the owner's fault has at times been liberally applied.

In *Cohen v. Farley* (28 Misc. 168), decided by the Appellate Term in 1899, the owner stated to the broker, orally and on a card given at the time of his employment, that the property was 23 feet wide. The broker brought a purchaser; a price and terms were agreed upon; a contract was drawn; but before signature it was found to relate only to the 22 feet, 7 inches, actually owned. In allowing the broker to recover commissions, the Court held, through Freedman, P. J., that the broker and the proposed purchaser had relied and acted, and had a right to rely and act, on the owner's statement and the printed card, and that "the size of the lot was an important element in the contract between" the owner and the broker. *Diamond Co. v. Hartley* (*supra*) was commented on, in an effort to distinguish that case on the ground that it appeared therein that the owner's statements were casual and not for the purpose of inducing anyone to consider purchasing the property.

In *Seidman v. Rauner* (51 Misc. 10), decided in 1906, the same Court held, through Leventritt, J., that where the owner had given

the purchaser an "option" but no enforceable contract had been signed, the broker's recovery was not barred, if it appeared that the purchaser was willing to close for the property as described in the "option" but the owner had therein misrepresented the terms of mortgage. To the same effect is *Frank v. Connor* (107 N. Y. Supp. 133), decided by the same Court a year later. "The non-execution of a formal contract cannot defeat the plaintiff," added the Court.

Goodman v. Hess (56 Misc. 482) was also decided by the Appellate Term in 1907, and is closely in point. The authorization to the broker was upon a printed form, and in it appeared the purchase price and particulars of the property. The annual rental was materially misstated. The broker procured a purchaser willing to buy on the stipulated terms the property described, but not the property with rentals \$264. less. No contract was signed, and the transaction fell through. The Court held, through Erlanger, J., that

"The refusal of the purchaser to complete because of the defendant's misrepresentations as to the rental value cannot defeat the claim for commissions. Defendant cannot urge his own wrong and thus deprive the broker of the commissions earned by him. But for his misrepresentation as to the rental the contract of sale would have been signed."

In *Hess v. Investors and Traders' Realty Co.* (67 Misc. 390), decided by the Appellate Term in 1910, the learned Court, per Lehman, J., very carefully limited, to the precise facts passed upon, the decisions in the *Diamond Co.*, *Hausman*, and *Keough* cases, hereinbefore reviewed. The broker had been employed to procure a purchaser for a single plot of ground "45 x 100 feet." The employer and the purchaser agreed on terms and entered into a contract which provided, in substance, that the purchaser should have the right to reject title and refuse to close, in the event the owner was not able to deliver title to a contiguous plot such as he had described to the broker and had covenanted to convey. The Court held that the broker had performed the task which his employer hired him to perform, and that "the question of the defendant's liability is to be considered from the standpoint of what the broker engages to do. (*Alt. v. Doscher*, 102 App. Div. 344; affd. on opinion below, 186 N. Y. 566.)

In *Putnam v. Berger* (95 App. Div. 62), a *per curiam* opinion was filed by the Second Department in 1904. The owner, as here, gave the broker a written authorization to sell. In that writing,

the owner stated that possession could be given at once. The owner and the proposed purchaser came to agreement on price and terms, but the transaction failed because the owner could not give immediate possession. The Court held that a judgment for the broker was warranted, because he brought his employer a purchaser willing to buy on the-represented terms, and his right could not be defeated because one of those representations was incorrect.

A significant comment upon *Hausman v. Herdtfelder* (*supra*) emanated from the Second Department in *Sotsky v. Ginsburg* (129 App. Div. 441), decided in 1908. In the *Sotsky* case, the owners had represented, to the broker and to the proposed purchaser, that the lot had a frontage of something over 75 feet. The broker procured a purchaser for such a property at the owners' price, but before the contract was signed, the owners decided they wanted more money, though it had been discovered that the frontage was only 72 feet. The purchaser offered to pay nevertheless the original price for the plot as it was, but refused to pay the advanced price. The broker was held to have fulfilled his undertaking, and Woodward, J., added:

"The defendants now contend that this case is brought within the rule laid down in *Hausman v. Herdtfelder* (81 App. Div. 46) and that the plaintiff is not entitled to recover. *Without considering how far that case might be regarded as controlling under its own particular facts*, it is sufficient to point out that in that case the parties never came to an agreement, while in the case at bar they did; the plaintiff's proposed purchaser not only agreed to take the premises at the price and terms suggested by the defendants at the original meeting, but after the defendants had repudiated their contract and demanded an increase, he was still ready, willing and able to take the premises with the shortage of three feet frontage at the original terms. Under such circumstances it is not to be questioned that the brokers had earned their commissions; this was done at the first meeting of the parties"—

a statement significant in view of the fact that at this meeting no contract was signed or drawn, and the purchaser was offering to buy for \$160,000. a 75-foot frontage and the owners were offering to sell a 75-foot frontage, although the owners had, and could convey, only a 72 foot frontage, with the result that it cannot be said that there was at any time a meeting of the minds as to a frontage which the owner could actually have conveyed. The broker had performed *his* contract with his employer, and was allowed to recover, even though his employer and the prospective

purchaser never reached an actual or enforceable agreement, *as between themselves*.

The latest decision of any appellate Court on the subject seems to be *Schweid v. Storandt* (157 App. Div. 855), which had a well-litigated course in the Fourth Department (see, also, 138 N. Y. Supp. 1141; affirmance without opinion, 139 N. Y. Supp. 1144; leave to go to Court of Appeals refused; reargument granted, 155 App. Div. 947; appeal decided, 157 App. Div. 855). Robson, J., wrote for the majority of the Court, and with him concurred McLennan, P. J., and Kruse and Lambert, JJ.; Foote, J., dissented. The majority quoted with approval the declaration of *Sibbald v. Bethlehem Iron Co.* (*supra*) and specifically adopted the rule of *Dotson v. Milliken* (209 U. S. 237); the dissenting opinion was based specifically upon *Curtis v. Mott* and the other precedents above reviewed as in accord therewith. The owner had employed the plaintiffs to procure a purchaser for a certain apartment building in Rochester, at a price of \$50,000., and the broker procured a purchaser ready to buy at the price. No enforceable agreement between the principals was ever entered into, but the plaintiffs nevertheless claimed their commissions. Some months after the brokerage contract and while the plaintiffs were endeavoring to find a purchaser, the owner had furnished a written statement of the number of apartments and the sums for which they were separately rented.

After the parties reached accord on essential terms, the substantial incorrectness of the information thus imparted to broker and customer was disclosed, and the transaction fell through. The owner's misstatements as to rental, although made months after the brokerage contract, was held to be "treated and considered in relation to the original contract of agency the same as if they had been actually included therein."

The Court added, upon the authority of *Dotson v. Milliken* (*supra*), that

"If it (the mis-statement of rental) had been contained in the original contract of agency there could be little doubt that, if false and the agent relying upon the truthfulness of the representation and having secured an able and willing purchaser who also relied upon the truthfulness of the representations, and who on learning their falsity for that reason refused to purchase, the agent would have earned his commissions."

Upon this point, the minority opinion significantly said:

"The cases of *Hess v. Investors & Traders' Realty Co.* (67 Misc. 390) and *Dotson v. Milliken* (209 U. S. 237) are cases where the owner's mis-representations as to his property were made to the broker at the time of his employment, and, hence, entered into the contract of employment. The distinction between these cases and the one before us is apparent."

What conclusion is to be reached from this conflict of decisions? As to my personal view, I can perhaps do not better than to quote my determination in the *Daly* case (*supra*), to the following effect:

"Upon a survey of the whole subject, I am of the opinion that where the owner makes to the broker a definite representation with respect to the current rentals of the property, and makes it, whether as a part of the original authorization or not, under such circumstances as clearly to import the owner's knowledge that his statements to the broker are to be used by the latter in procuring a purchaser for the property so described, the better-supported rule is that the broker fulfills his task by procuring an acceptable purchaser for the property as so described, and is not barred of recovery because the prospective purchaser will not meet the owner's terms for the property as it actually is. To reach a contrary view would be to violate the fundamental concept so clearly stated in the *Sibbald* case, that he who asserts the non-performance of a condition precedent, cannot urge non-performance occasioned by his own act or fault, and that he who employs an agent to enable himself to secure a given result cannot defeat the agent's claim to compensation by asserting that his own carelessness or fraud sent the agent out to enable a result which the employer could not consummate. Analysis of the authorities seems to warrant the conclusion that the plaintiff at bar has sufficiently performed his contract with the defendants, and is entitled to have a jury pass upon his claim for compensation.

"The suggestion that the broker's redress must be sought in an action for damages for fraudulent representations, rather than upon the brokerage contract, seems to place emphasis upon the form of action rather than the substance of right. Besides, no fraudulent intent may have entered into mis-statements which set the broker at work on his futile task, and even when fraud is present, what is the measure of the damage proximately caused? If it be true, as the Supreme Court of the United States has held (*Dotson v. Milliken, supra*), that performance of the brokerage contract does not necessarily import a resultant signing of a contract between the owner and prospective purchaser,

the broker's rights seem fairly to spring from his contract with his employer and the fair estoppel of the latter from denying that the brokerage contract is performed by the production of an acceptable purchaser for the property as described by the owner. Nor is it possible to give efficacy to the plea that sanction of the Federal rule will lead, in New York City, unscrupulous brokers to act in collusion with supposititiously "ready" purchasers, in mulcting owners through false claims of inaccurate descriptions followed by simulated readiness to meet the owner's terms for property as thus mis-represented. If the rule is to be limited to statements contained in written authorization, signed and delivered at the time the broker is employed, that would seem to be a matter for legislative, rather than judicial, promulgation of the acceptable public policy. In any event, the mis-representations here complained of were in writing, were an integral and physical part of the brokerage contract, and were persisted in despite repeated requests for the detailed information which would seasonably have disclosed their inaccuracy. The present case therefore stands on ground as to which the majority and minority alike in *Schweid v. Storandt* (*supra*), held a common view."

It may be added that, following the foregoing determination in the *Daly* case, no appeal was taken by the defendant owners. The controversy was settled between the parties, without an appellate determination of the correctness of the ruling above quoted. If my ruling in that case was error, that will remain to be established in some other case. I have thus far found no reason, however, to change the views therein expressed, or to doubt that the eventual ruling of the New York Court of Appeals will sustain the right of the broker to redress, under the circumstances discussed in this article. Where the elements of false and fraudulent statement by the owners are clearly present, I am inclined to the belief that, so far as the question under discussion is concerned, the broker would be on more surely solid legal ground, if his action were made to sound in damages for fraudulent inducing of action and effort. His difficulty under that theory of action, however, would appear to be in proving proximate damages from the owner's mis-statements of fact. What would be his measure of recovery? The reasonable value of the efforts he was induced to put forth? Hardly his commissions for effecting the sale of the property actually owned but fraudulently mis-represented, because it does not appear that if the owner had accurately represented the property, the broker would have procured a purchaser at all. If this be the theory of the broker's recovery, may he not have as dam-

ages the reasonable value of the efforts expended, irrespective whether he procured any prospective purchaser or not, if only it appears that the owner fraudulently misrepresented the property to him as a part of the statements inducing him to labor to bring about a sale. Upon the whole matter, I remain of the opinion that, whether or not the owner's mis-statements are wilful and fraudulent, the broker performs his brokerage contract by producing a ready and able purchaser for such a property as the owner described in his authorization to the broker, and that the latter may therefore recover his commissions in an action upon the brokerage contract.

WM. L. RANSOM.